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EUI Working Paper LAW No. 91/19

Class Actions in Relation to Cross-Border Pollution.
A Dutch Perspective

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

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BADIA FIESOLANA, SAN DOMENICO (FI)

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Printed in Italy in September 1991
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

CLASS ACTIONS IN RELATION TO CROSS-BORDER POLLUTION

A Dutch Perspective

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1. Introduction

It seems necessary, right from the outset, to redefine the topic as introduced in the title. Seen from a comparative point of view, this title suggests only one of the types of answers given by legal systems to an underlying question, and an answer which does not fit the Dutch situation at all. To put it bluntly, in the technical sense there are no class actions in Dutch law, at least no actions comparable with the type of action as indicated under Rule 23 of the American Federal Rules of Civil Procedure and other common law systems.

In order to find an answer in the Dutch legal system to the question which I think is implicit in the title of the topic, we have to resort to a comparative rephrasing of the question.

When we are trying to define the area and boundaries of the topic, there are two main dimensions to keep in mind:

1. The **aggregation** of a certain number of persons into a group which is allowed to litigate, and which aggregations may vary from an ad hoc

combination of a few persons on the one hand to permanent association in the form of legal entities such as associations, foundations and trusts, etc.; and

2. the **(diffuse) rights or interests** for which these aggregations are prepared or designed to litigate: personal, individual interests and rights, collective or group rights, the general interest, and everything which lies between these extremes.

As far as these rights and interests are concerned, in this report I will restrict myself as much as possible to an area which, conceptually, is in itself not very clear at all: environmental interests and rights. It is, however, not possible to refrain from some remarks and explanations concerning more general issues, as Dutch law does not always distinguish between environmental values and rights and interests at large.

Thus, I propose to deal with group actions in civil procedure concerning environmental issues according to Dutch law and practice, in the hope that this more abstract *tertium comparationis* will enable thus to compare the phenomena, their legal design, their function, their peculiarities, in different legal systems, and to look for improvements.

The loose description just given does not necessarily rule out traditional ways in which courts are used such as the test-case which formally involves only one claimant and one defendant but which can be more or less 'constructed' with a view to its spill-over effect through the 'added value' ("meerwaarde") which each decision derives from being a precedent in a flow or system of court decisions[1]. Neither does it conceptually extradite joinder as an associational device in civil litigation, but these more

[1] Cf. d'Oliveira, *De meerwaarde van rechterlijke uitspraken* (Arrêts de règlement en precedenten), Preadvies Ned. Vereniging voor Rechtsvergelijking 1975.

traditional groupings will receive only little attention in this paper.

Before embarking upon the treatment of group actions in Dutch civil procedure, I want to point out that, as concerns **functions**, two elements play a role in different degrees: on the one hand, a kind of neutral need for procedural efficiency in handling cases which involve a lot of parties; and on the other, the adequate treatment of non-individual interests and rights: the general or public interest, which, in traditional continental thinking is the domain reserved for the state and its organs and institutions. Let us say the handling of the claims of the victims and their families of an airplane disaster, on the one hand, and those of an environmental group which is systematically attacking licences to pollute the Waddensea or to build nuclear plants, on the other. The first is an example in which the emphasis lays on efficiency in dealing with the matter: the many claims arising out of the disaster should -- notwithstanding individual variations -- be dealt with in such a way as not to repeat common elements in each and every claim: here streamlining is the key word. Institutional arrangements may vary from joinder to multi-district litigation which is becoming more and more successful, doing even better quantitatively than class actions[2].

On the other hand, the defence of the Waddensea against pollution is more concerned with the general interest, which is another word for politics, or rather a word which is available for contestation between citizens and governments. We have become aware that neither has a monopoly to define the general interest, and one of the places were the power to define the content of the general interest is at stake is precisely the group action in civil and administrative procedure. Thus, where the administration may think it

[2] See B. Garth, General Report, *Group Action: Class Actions, Public Interest Actions, or Organisation actions and Parens patriae Jurisdiction*, XIIIth International Congress of Comparative Law, Montreal 1990, p. 19/20.

proper not to pursue a specific matter, a public interest group may pick it up because it has a different view from the government on the implications of the public interests.

2. Structure of the report

In the last decade, the topic of safeguarding diffuse and collective interest has drawn a lot of attention, also in the Netherlands[3]. The present author has written several Dutch reports for comparative purposes[4], on which this paper will draw in some respects, and to which I refer for the more general subjective and objective aspects of groups rights and collective interests in civil litigation.

In this report the focus will be on the most important international aspects of (civil) litigation by groups for diffuse environmental rights and interests. In the following paragraphs I will first deal with the specifics of the international scene: international jurisdiction including summary

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[3] See for the literature Onrechtmatige Daad (loose leaf) II (van Nispen), nr. 219a.

[4] See H.U. Jessurun d'Oliveira, *Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation*, national report for the Netherlands for the VIIth International Congress on Procedural Law, Würzburg September 1983, *NILR* 1983, pp. 161-187, also in: Nederlandse Vereniging voor Procesrecht (eds), *Effectieve Rechtsbescherming en constitutionele controle* (1984), pp. 157-182 (The general report Mauro Cappelletti-Bryant Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure*, was published in *Civil Justice Quarterly* 1983, pp. 111-147); idem, Group Actions in Civil Procedure, National Report, published in E.H. Hondius, G.J.W. Steenhoff (eds), *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990 (1990), pp. 135-148; see also idem, Bestrijding van internationale milieu-criminaliteit. Een slachtofferperspektief, *Recht en Kritiek* 1984, pp. 366-376, and idem, Ch. 7.1 and 7.2 (international private and international public law) in: Brussaard-Drupsteen-Gilhuis-Koeman (eds), *Milieurecht* (1989), see also forthcoming second ed., 1991.

proceedings (3); locus standi (4); the choice of the applicable law in transboundary pollution cases (5); recognition and enforcement of judgment (6), and finally some selected issues (7), notably the status of permits in the international arena (7.1.), and the available remedies, especially injunctive remedies (7.3.).

3. International Jurisdiction

3.1. *EEX*

By far the most important international instrument for the Netherlands concerning jurisdiction in civil and commercial matters is the Brussels Convention 1968 (EEX)[5]. This Convention, which not only gives direct rules of jurisdiction but also simplifies recognition and enforcements of judgments regularly produced in the Member States without being a EEC legislative act in the narrow sense, is nevertheless based on art. 220 EC Treaty which asks for measures to simplify formalities in recognition and enforcement of judgments.

Central to the safeguarding of environmental rights and interests are art. 5(3) EEX and art. 24 EEX. Which judges are available in transboundary pollution cases? If these cases amount to torts the answer is to be found in art. 5(3) EEX; whereas provisional measures may also be taken by the judge indicated in art. 24 EEX.

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5 *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, Brussels, 23 September, 1968.

3.1.1. Art 5(3) and the European Court of Justice

According to Art 5(3), a person domiciled in a Contracting State may be sued

> "3. In matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred."

Although originally the European Court of Justice has defined the relation between the general basis for jurisdiction of art. 2 (at the domicile of the defendant in a Contracting State) and the special jurisdiction of e.g. art. 5(3) as juxtaposition, in later judgments it stated that these special rules on jurisdiction should be seen as deviations from the *actor sequitur rei*-principle and it derived from this relationship the conclusion that the deviating provisions should be construed narrowly[6].

It is to be seen which constrictions the European Court had in mind, and especially whether it intended to deviate from its earlier liberal decisions concerning the demarcation lines with other provisions of the Convention; it is clear, however, that it intended not to bid farewell to the broad construction, in the case itself, of the phrase "matters relating to tort delict or quasi-delict", as it excluded only liability relating to a contract (which is the subject matter of art. 5(1))[7]. I submit that the European Court has not come back either from its broad interpretation of the phrase, so extremely important in environmental matters, "place where the harmful event occurred" in the Reinwater case[8]. This was one of the very first cases brought before

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6 See ECJ, 27 Sept. 1988, case 189/87, NJ 1990, 425 note by J.C. Schultsz.

7 ECJ, 27 Sept. 1988, case 189/87 (Kalfelis v. Schröder, Münchmeyer, Hengst & Co.), NJ 1990, 425 note by J.C. Schultsz.

8 ECJ, 30 Nov. 1976, case 21/76 (Bier en Reinwater cs, vs. Mines de Potasse d'Alsace) ECR

the European Court of Justice concerning the Brussels Convention.

The facts of the case are well-known and can be summarized as follows in the words of O'Malley and Leyton[9]

> The allegation was that the French mine-owners were discharging chlorides into the Rhine, so polluting it that Bier's horticulture business in Holland was put to considerable expense to limit the damage to its crops. The horticulturalists, supported by the Reinwater Foundation (whose sisiphean task is to promote the purity of the water of the Rhine) brought an action against the French mine-owners in the court at Rotterdam. The defendants objected to the jurisdiction of the Dutch court and were successful at first instance on the grounds that the event that had caused the damage could only be the discharge of the polluting salts into the Rhine, and that that had taken place within the territorial jurisdiction of the French courts. Relying on art. 5(3), the plaintiffs appealed to the Gerechtshof in the Hague, which referred the question of the interpretation of "the place where the harmful event occurred" to the European Court of Justice. (...)[10].

The Court ruled, in the event, in the following way:

> "Where the place of the happening of the event which may give rise to liability in tort, delict, or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred", in art. 5(3) ... must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.
> The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage."

1976, 1735.

9 *European Civil Practice* (1989), p. 425.

10 That this case, concerning the locus delicti came from litigation in the Netherlands is no accident, for there does not exist, under Dutch municipal law, a jurisdictional rule based on this locus delicti: the only grounds therefore was to be found in art. 5(3). Reinwater had deliberately waited for the coming into force of the Brussels Convention in order to have a chance to start proceedings in the Netherlands.

The reasons for this autonomous interpretation, independent from the way in which Member States deal with the question of localizing harmful events have primarily to do with a procedural perspective, and less with e.g., a principle to protect victims or weaker parties. Its efficiency in terms of gathering evidence in various ways, the place of the judge vis-à-vis the relevant facts and parties etc. counts in the first place. As it is impossible to prefer *a priori* one of the two or more potential places -- *locus actus*, *locus* or *loci damni* -- the European Court gives them equal weight. Certainly, it could have decided that the judge should localize on an ad hoc efficiency basis, but that would have created a lot of uncertainty. So in the end the decision is left in the hands of the plaintiff, who, of course, will bear in mind that the *locus actus* will regularly coincide with the *forum rei* of art. 2, and that generally the only additional forum will be the forum of the *locus damni*, which, in turn, will normally coincide with the *forum actoris*. In effect, then, the autonomous interpretation given by the European Court in the Reinwater case to "the place where the harmful event occurred" works in favour of the plaintiffs, although this is not what the Court said to have intended[11].

In cases of transboundary pollution -- explicitly mentioned by the Court -- the legal concept of *locus delicti* has exploded into useful fragments which can each found jurisdiction. Thus, in the Reinwater case plaintiffs all along the river Rhine can sue either at Mulhouse (locus actus) or at their respective

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11 The narrowing down of the heads of jurisdiction under art. 5(3) can be detected however in ECJ, 11 Jan. 1990, case C220/88 (Dumez France S.A. v. Hessische Landesbank), where it was decided that the jurisdiction rule of art. 5(3) may not be interpreted in such a way that a plaintiff, alleging to have suffered damage as a consequence of damage incurred by other persons, who are direct victims of the harmful event, can summon the originators of this event before the courts of the place where he himself found his assets damaged.

places where the damage occurs[12].

The choice of court -- which in some quarters is called depreciatorily forum-shopping[13] -- by the plaintiff will depend on many factors: the law to be declared applicable by the court, the substantive and procedural advantages and disadvantages of this law, the presumed favourable or unfavourable bias of the Court towards plaintiff or defendant, the prospects for execution at the locus actus or elsewhere, etc.

3.1.2. Art. 5(3) and the Dutch courts

National courts, including the Dutch ones, have regularly applied art. 5(3) as interpreted by the European Court of Justice, in environmental litigation. Two important cases merit special attention, as they both have had to solve complex problems of litigation in the area of transboundary pollution.

a. Hoge Raad 14 April 1989, NJ 1990, nr 712 (*Benckiser*) notes by C.J.H. Brunner and J.C. Schultsz.

A German chemical industry experiences enormous difficulties in disposing of large amounts of gypsum waste containing huge proportions of toxic cyanides. Export to the GDR proved too expensive, export to other countries as Belgium and France too problematic in terms of administrative authorization. So Benckiser resorted to fraud and illegal export to the Netherlands by selling the toxic waste to a mala fide Dutch buyer, who

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12 See on the ECJ 21/76 case D.S. 1977, p. 613, note Droz, *Rev. Crit.* 1977, 563, note Bourel, Clunet 1977, p. 728, note Huet; *Rev. Jur. Env.* 1977, p. 323 note Kiss; d'Oliveira, La pollution du Rhin et le droit international privé, in Hueting-van der Veen-Kiss-d'Oliveira, *Rhine Pollution/La pollution du Rhin* 1978, pp. 81-127.

13 Cf. Fritz Juenger, Forum Shopping, *Rabelsz* 1982, p. 708; idem, Forum Shopping, Domestic and International, *Tulane Law Rev.* 1989, pp. 553-574; K. Siehr, "Forum shopping" im internationalen Rechtsverkehr, *Zeitschrift für Rechtsvergleichung* 25 (1984), p. 124 ff.

forged expert reports analysing the gypsum and dumped the substances in bulk in some eight sites in the Netherlands[14].

The State and two firms on whose sites the waste had fraudulently been dumped asked in summary proceedings that defendants (both the Dutch firm, its director, and Benckiser) remove, this time legally, the toxic waste from the dumping sites and from Dutch territory (the State). The President of the District Court Dordrecht founded his jurisdiction on art. 5(3),

> "because according to the allegations of the plaintiffs the harmful effects of the tort which has been committed -- the environmental pollution caused by the deposit of the gypsum mountains -- manifest themselves in the Netherlands."

The State's claim was dismissed by the President for reasons derived from municipal law, but the claims of the other plaintiffs were granted. The State and Benckiser appealed. Concerning its jurisdiction the Appeal Court invoked not the Brussels Convention, but two municipal provisions: arts. 289 j°, art. 126(3) and (5)C.C.Pr. The first provision is specifically designed for summary proceedings. It is not clear beyond doubt what the Appeal Court had in mind[15]. If it referred tacitly to art. 24 EEX concerning "provisional, including protective measures as may be available under the law of that State" which clearly refers back to the municipal law of the State of the court involved, one may question this selection as the petition by the Dutch state was not necessarily aimed at interim relief: the removal from

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14 As Dutch producers of wastes, including local authorities resort to illegal exports to Belgium. Cf. *De Volkskrant* 18 May 1991.

15 Cf. G. Betlem, Grensoverschrijdend handhaven, De Benckiser-zaak en het EEG-Executieverdrag (Transboundary enforcement, the Benckiser-case and the Brussels Convention), in: van Buuren-Betlem-Ijlstra (eds), *Milieurecht in stelling* (1990), pp. 158-181 (at p. 161).

Dutch territory was seen as the end of the matter, it concerned the substance of the matter.

Before the Dutch Supreme Court this jurisdictional issue was not raised any more, so that the Hoge Raad was precluded from deciding it or asking a preliminary ruling[16]. Other aspects of the Benckiser-case will be discussed in the next paragraphs.

b. A less well-known case, but as interesting as Benckiser, and certainly of more recent date, is *Reinwater* cs vs. *Sopar*, District Court Middelburg, 8 March 1991[17]. Three environmental foundations ("Stichtingen") and one environmental Association whose members, in turn, were environmental foundations and associations, asked in summary proceedings before the President of the District Court of Middelburg for injunctive relief against a Belgian chemical and pharmaceutical industry. This industry, with a plant just across the Belgian-Dutch border on the transboundary canal between Ghent and Terneuzen[18] discharged large quantities of waste water, contaminated with PACs (polyclycic aromatic carbons), which are considered to be carcinogenic and are not easily degradable. As these PACs were transported through the canal from Belgium to the Netherlands and in

16 Betlem, l.c. (previous note) argues, referring to ECJ 16 Dec. 1980, case 814/79 (Netherlands State v. Hüffer), NJ 1982, nt J.C.S., Jur. 1980, 3807, that the State's claim would not fall under art. 5(3) as it did not concern 'a civil or commercial matter', although art. 1401 Civil Code (the general provision on torts) was seen as the foundation of the claim to remove the toxic waste, i.e., for *restitutio in integrum*. As this issue lies at the margin of our topic, I will leave the discussion of it aside.

17 Not yet published. Appeal is pending.

18 See for the stagnating negotiations between Belgium and the Netherlands concerning the pollution of the transboundary water courses (including the river Meuse), letter of 31 August 1989 by Minister of Transport to Lower House of Dutch Parliament 1988/89, 21.278 nr. 1.

this way polluted Dutch surface waters the Dutch environmentalists asked the president for an injunction to stop the discharges on pains of a heavy periodic fine; in case of non-compliance this fine is payable to the plaintiffs.

As to his jurisdiction the President considered that he had the power to decide the case under art. 5(3) EEX, "as Reinwater cs alleged that the illegal discharges by Sopar caused damages also in the Dutch part of the Canal Ghent-Terneuzen and in the Westerscheldt, and this is sufficient to assume this jurisdiction".

This decision is clearly in line with the Reinwater case, decided by the European Court of Justice in 1976, on a fact-law pattern which is in many respects comparable. I will return to some of its issues in the next paragraphs: issues of standing, the significance of authorizations, the injunction which has to be carried out in another country than that of the forum. One of the differences with the mentioned precedent is the fact that *Sopar* concerns summary proceedings whereas the *Reinwater* case does not. This raises the problem whether it is not rather art. 24 EEX on which jurisdiction has to be based than art. 5(3) EEX.

3.1.3. Art. 24 EEX

Art. 24 EEX allows applications to be made for provisional, including protective, measures to the Courts of a Contracting State even if the courts of another Contracting State have jurisdiction as to the substance of the matter. These measures must be available under the *lex fori*. It is generally accepted that the summary proceedings of the Dutch *kort geding* are to be considered as leading to provisional measures in the sense of art. 24 EEX[19], although in

[19] Cf. Vlas in Van den Dungen, *Rechtsvordering* (loose leaf) ad art. 24 EEX.

the vast majority of cases there is no follow-up with a "bodemprocedure", litigation concerning the substance of the matter, either in the same or in another court. Art. 24 EEX is of course not preemptive in the sense that it does not prohibit the application of provisional measures by the judge who is dealing with the substance of the matter. Art. 24 gives an **extra** opportunity to plaintiffs to safeguard their position and does not withdraw such opportunity to defend their position before the court which has power to decide the substance of the case.

Dutch courts have sometimes been reluctant to grant interim relief in international cases, especially if the court order had to be carried out in another (Member) State.

> An example is Pres. District Court Middelburg, 24 April 1987, NJ 1989, 744 with note J.C. Schultsz; Milieu en Recht 1987, p. 693, with note J.H. Jans.

Application by Dutch environmentalist groups to close down the nuclear plant in Doel (Belgium). As it was not clear whether art. 5(3) also concerns threatened wrongs as in this case and not only wrongs which have already 'occurred', we are to say the least also in the zone of art. 24 EEX and its protective measures. Although the President based himself 'provisionally' on art. 24 EEX he denied the request because he felt that an order enjoining a foreign domiciled party to act in another Member State would lack effectivity and was in a way *ultra vires*[20]. According to Dutch municipal law at least all those Dutch courts have jurisdiction for provisional measures which would have jurisdiction under the other provisions of the

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[20] See also d'Oliveira in Brussaard-Drupsteen-Gilhuis-Koeman (eds), *Milieurecht* (1989)[1], p. 467.

Convention; furthermore, it would be in the spirit of the Convention to allow the (Dutch) court of the place were effect is to be given to the court order to issue interim relief under the Convention[21]. In the nuclear plant case the district court of Middelburg would have had jurisdiction under art. 5(3) EEX as judge of the (potential) *locus damni*.

In *Benckiser* the Germany-domiciled German defendant was bound by the Dutch court order to act in the Netherlands. This situation is less controversial than the fact-pattern in which the court order obliges a party to act outside the jurisdiction, and this issue forms the object of the next subparagraph.

3.2. *Cross-border injunctions*

As we have seen, the President of the Middelburg District Courts had grave doubts about his power to grant interim relief to plaintiffs in the form of court orders to be complied with in another country.

This 'enlightened self-restraint' out of fear to be seen as a splendid torch bearer of *Weltjudikatur* seems to be unfounded, precisely in the context of the Brussels Convention. Under certain conditions which have been developed in the case law of the European Court of Justice[22], injunctive measures are judgments and as such enjoy the regime of the Convention which tends to facilitate the free movement of judgments within the European Community according to title III EEX.

Interlocutory orders issued by the Court before which the substantive case is

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21 Cf. Verheul, *Rechtsmacht* I, par. III 175.

22 ECJ, 21 May 1980, case 125/79 (*Denilauler* v *Couchet*) Jur. 1980, p. 1553, NJ 1981, 184 note J.C. Schultsz.

pending may be recognized and enforced in other Member States[23] according to title III of the Convention, and the same is true for art. 24 measures. This exercise of judicial jurisdiction is allowed under public international law, and it depends on municipal law if indeed the national judge has under his own law -- to which art. 24 refers -- the power to bind parties to act outside the territory. This is the case under Dutch law.

In a recent case, the Hoge Raad has explicitly stated that Dutch courts have these powers, not only in ordinary proceedings, but also in "kort geding".

In a case concerning industrial property rights under the Benelux Merkenwet, the Dutch Supreme Court stated (24 November 1989), R.v.d. W. 1989, 267 (*Interlas*) explicitly:

> "Unless something different follows from law, the nature of the obligation or from a legal act, the person who is obliged towards another to give something, to do or to refrain from doing something will be condemned by the judge upon demand of the person entitled to act accordingly. Generally speaking there is no reason to assume that there is no room for such an order if it concerns an obligation -- in the event an obligation according to foreign law -- that has to be complied with outside the Netherlands. A more restrictive view (...) finds no support in law, and would lead to the undesirable result in a time of increasing international contacts, that, in the case of wrongs with an international character -- such as infringement of intellectual property rights and unlawful competition in different countries or transboundary pollution of the environment -- the Dutch victim could be forced to apply to the courts of each and every country concerned."

This is a clear and unambiguous statement by the Hoge Raad diametrically opposed to the consideration of the Middelburg president in the nuclear plant case. It allows, for instance, to order all those firms and industries who pollute the river Rhine along its Swiss, French, German and Dutch banks to

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[23] ECJ, 27 March 1979, case 143/78 (*De Cavel* I) ECR [1979], p. 1055.

refrain from doing so, by one and the same Dutch court order[24]. It is not restricting itself to the EEX or other Conventional arrangements facilitating "extraterritorial" court orders. In cases where the efficacy of these transboundary injunctions may seem less than satisfactory, given the way in which the foreign court deals with recognition and enforcement, it should be borne in mind that non-compliance by the defendant will result in the *dwangsom* becoming due, and this fine may be collected under existing conventions wherever assets of the defendant may be found. Only where this residuary efficacy of the judgment is lacking a judge may come to the conclusion that an extraterritorial injunction is what the French call a 'coup d'épée dans l'eau', and refrain from giving such an order.

3.3. *Lugano*

For the sake of completeness I mention here, that the EEX, to which Spain and Portugal acceded on the basis of the Convention of San Sebastian, concluded on 26 May 1989[25], has been flanked by the so-called Parallel Convention of Lugano of 16 September 1988 with the EFTA countries[26]. As to the provisions treated above, no relevant discrepancies between EEX and Lugano are to be noticed. The effect of the coming into force of the Conventions first mentioned will be the expansion of the territory in which

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24 The statement that 'Dutch courts do not have jurisdiction to authorise the taking of provisional measures outside the Netherlands' (in O'Malley-Leyton, *European Civil Practice* (1989), p. 1444) if it has ever been a true description of Dutch law, has already become obsolete in the light of the statement of the Hoge Raad in *Interlas*.

25 JO, EC 30 October 1989, L.285.

26 Cf. Droz, La Convention de Lugano parallèle à la Convention de Bruxelles, *Rev. Crit.* 1989, p. 1-51, and the literature mentioned by Vlas, *Burgerlijke Rechtsvordering* (loose leaf), introduction, nr. 5.

on the basis of uniform rules of jurisdiction the free movement of judgments will be guaranteed.

3.4. *Council of Europe Draft Convention on Damage resulting from Activities Dangerous to the Environment*[27]

The above-mentioned draft contains articles on jurisdiction, proceedings and recognition and enforcement.

In this section I mention briefly art. 21 concerning jurisdiction. This article provides for jurisdiction in state parties at the Court of the locus damni and the locus actus whenever compensation is sought; furthermore the forum rei is available.

Actions for access to information have to be brought exclusively in the courts of the place where the defendant has its habitual residence or where the dangerous activity is conducted. This provision makes it necessary, if the action is brought at the court of the locus damni, to stay proceedings, according to art. 24, until one of the other courts has decided on access to information necessary for the proceedings in the first court. I doubt the efficiency of this narrow provision.

There is a tentative draft rule between brackets on the actions brought by organizations under art. 20 of the Convention[28]. According to this draft provision these actions may only be brought within a State party before the judge or administrative authorities of the defendants' habitual residence or where he carries out the dangerous activity. This would rule out the forum of the locus damni.

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[27] See also below, 4.2.3.

[28] See below, 4.2.3.

Although one can see the logic of this restriction, as public interest organizations may not sue for damages under this draft Convention, and thus the place of the damage loses weight as grounds for jurisdiction, nevertheless the wisdom of excluding this court can be challenged. In the first place the provision would not be in line with the Brussels and Lugano Conventions. Although Art. 57 of the Brussels Convention accepts deviations from its rules by later Conventions on special subjects, it is not very elegant to allow such a derogation in this matter. Neither is it useful or necessary. Injunctions of the kind described in art. 20 can be given also by the judge or administrative authority of the *locus damni*; and this judge may be more inclined to do so than the judge of the origin of the damage caused by the dangerous activities. My conclusion is that art. 21 has to be remodelled and streamlined and brought into line with the Brussels Convention arts. 5(3) and 24.

4. Locus standi

A very important, second hurdle to be taken consists of the answer given to the crucial question of standing. Will organisations be allowed to act not only in their (narrowly considered) own, individual interest, but also in the interest of others or the community at large? "Point d'intérêt, point d'action" is the famous catch-phrase, but, as all slogans do, it may, in the course of time and under the influence of new developments change in meaning. The Dutch code of civil procedure, as other such continental codes is in tune with the time in which it was created, imbued with liberal-individualistic notions about what had to be conceived as the rights and interests of a

person.

Nowadays this atomistic view has been making place for a more socialized view of rights and interests: on the one hand the exercise of individual, exclusive rights is checked in many different ways by considerations of the well-being and interests of others and society as a whole; on the other, there exists strong pressure to accept that diffuse or collective rights and interests may be represented by members of the group involved and even by aggregations of persons who are involved in the same way as other members of society. Here, it may seem clear, is room for clashes with representational democracy and its implications, for clashes between law and politics, that is for constitutional tensions.

In this area there are notable developments in Dutch procedural law. Even in the seventies, the Reinwater Foundation in its battle against the pollution of the Rhine, was denied standing against the Mines de Potasse d'Alsace. The district court Rotterdam did not receive Reinwater in its claim to see the discharge of the chlorides declared a tort and the damage accordingly repaired, as it was presumed not to have an interest of its own[29]. As Reinwater had foreseen this judicial reaction or reflex, although it had hoped for a more activist role of the court, it had sought the alliance of some Westland horticulturalists (in turn backed by their own organisations) who undoubtedly had *locus standi in iudicio.* In this way, the proceedings became extremely shadowy, as the real actors stayed outside and in court only willing puppets could be seen as plaintiffs. Of course, the greenhouse owners had the required personal-individual interests, but they would never have engaged in this litigation but for the initiative and financial

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[29] See District Court Rotterdam, 16 December 1983, NJ 1984, 341, *Ars Aequi* 1984, pp. 153ff. with note d'Oliveira.

backing of Reinwater and the horticultural organisations.

A system of procedural law which relies on such fakes and artificial set-ups must eventually adapt itself to the measures of organisational litigation concerning diffuse interests and group rights. There are new tendencies to be noted in both case law and legislation.

4.1. *Case law*

> "What at first was barred from the court room as constitutionally impermissible interference -- such diffuse or public interests were supposed to be guarded by the representational democracy -- is gradually considered to be acceptable civic spirit." [30]

This statement from my above-mentioned report[31] was empirically investigated in an article published in 1985. On the basis of a study of the case law, the author, Mr. van Mierlo, came to the conclusion that my statement was "premature". "A few incidental judgments are not enough to be able to ... support the assertion. ... It is to be doubted whether judges now assess their constitutional position differently." An exception may be made, according to the author, for rulings by the President of the Amsterdam Court, but this case law meets with resistance, as is evident from a ruling by the Amsterdam Appeals Court (8 November 1984), in which it denied *ex officio* appellants (including a number of environmental organisations) *locus standi*.

Prediction is not a matter for everyone: shortly after, the Hoge Raad, in a breakthrough judgment in the same case, gave environmental organisations

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30 Note 4 (1983), p. 169.

31 Ch. van Mierlo, Acties van belangenorganisaties in het civiele geding, *Ars Aequi* 1985, pp. 183-189.

standing - as had the President in summary proceedings: *HR 27 June 1986, Nederlandse Jurisprudentie 1987, 743*[32].

A nation-wide, a provincial and a local environmental organisation called in summary proceedings for the municipality of Amsterdam to be stopped from dumping polluted mud from the Amsterdam canals in a neighbouring lake, the Nieuwe Meer, specifically for lack of permission for such dumping. The President of the Court had taken delivery of the request but rejected it: the Appeals Court *ex officio* decided inadmissibility for lack of specific interest of the organisations' own. The Hoge Raad squashed this and declared that the three environmental organisations were indeed admissible in their request.

The Hoge Raad sets this out as follows[33]:

> "The complaints are rightly proposed. The starting point should certainly be that the mere description of the objective of a legal person does not yet entitle it to submit a petition to the civil judge regarding interference with the interest which, according to the description, it has undertaken to defend, but exceptions are conceivable. Such an exception occurs here.
> In the first place, the interests affected in a petition like the present one - dealing essentially with securing a ban on further interference with the environment - lend themselves to "grouping", as has been brought out in the submissions before the Court by the environment associations; if there were no such possibility of grouping, then effective legal protection against threatened interference with these interests could be not inconsiderably hampered, since as a rule they affect large groups of citizens together, while the consequences of any interference for any one of these citizens are very hard to

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32 Commentaries on this important judgment in *inter alia*: J.H. Nieuwenhuis, *Ars Aequi* 1986, p. 638; M.A. Heldeweg en F.S. Fernhout, *Nederlands Juristenblad* 1986, p. 1203; W.H. Heemskerk, *Nederlandse Jurisprudentie* 1987, no. 753; P. Kottenhagen-Edzes, *Tijdschrift voor Milieu-aansprakelijkheid* 1987, pp. 34-40; L. Damen, Collectieven als procespartij in het milieurecht: een alledaagse zaak, in Collectieve actie in het recht, *Ars Aequi Libri* 1990, p. 73-85.

33 My translation, d'O.

predict.
It should further be noted that - by contrast with what the Court obviously assumed - the interests grouped here belong to the kind that falls under the protection that Art. 1401 BW is intended to offer; this also applies to the interest that also plays a role in the case in point: not, through actions carried out without permission like those the environmentalist associations accuse the municipality of, to be deprived of the possibility - to be dealt with in the next paragraph - of defending the above-mentioned interests in good time in licensing proceedings under the General Environmental Provisions Act, using the guarantees it offers.
In the second place, it is of importance that the General Environmental Provisions Act, applicable to permissions to be applied for under the Surface Waters Pollution Act, lays it down as far as entitlement to complaint and appeal is concerned not only that this is in principle due to "everyone" (though appeal is limited to those who had already made a complaint or had been unable to do so), but also explicitly indicates (Art. 79) that "in respect of private law organisations, the interests for which they have been called into being shall be regarded as their interests". With this acceptance of associations such as the ones in question here into the administrative phase - which acceptance, having regard also to the parliamentary genesis of the act, can be considered as unrestricted - it would as far as standing in proceedings about permission is concerned, be incompatible for it to be impossible for the same associations to act by summary procedure against conduct which they regard as wrongly taking place without permission and which could in principle lead to interference with the interests which the association, according to the description of its objectives, defends. This also means that it would not be appropriate in a case like the present one to require additional conditions for admissibility, such as for instance on representativity or actual activities."

Although the Hoge Raad has not thrown the door right open for interest organisations to appear in civil actions -- the decision is presented as an exception to the main rule that the mere enshrinement of the objectives of a legal person in its articles does not necessarily entitle it to go to law -- broad room has nevertheless been left for private (legal) persons interested in collective and general interests. In brief, the dimensions of this judgment can be given as follows:

- The Hoge Raad accepts the development in the case law of the lower courts: many judgments by Presidents of tribunals had preceded it, and as frequently occurs Appeal Courts had been more cautious; in this case the Amsterdam Court of Appeal had even denied standing *ex officio*, without the defendant having applied for this.
- Besides the description of objectives in the statutes of organisations, it is of prime importance that the interests involved in the demand lend themselves to "grouping"[34]. In the case in point what is involved is a prohibition on further pollution of the environment. Efficient legal protection would be lacking if all individuals with an interest in opposing environmental pollution had to decide to take action separately. Where large groups of citizens are in the same boat, it is efficient for their diffuse interests to be defended by clubs[35]. Cumulative consequences of environmental pollution are easier to show than the sometimes minuscule effects in an individual case where frequently, moreover, a *"de minimis non curat praetor"* idea takes primacy; the same goes for the *civis*[36].
- The interests served are protected by civil law, specifically by Art. 1401 of the Dutch Civil Code (unlawful act). The case in point concerned not only the interest in opposing further detriment to the environment, but also the interest in being able to act effectively on behalf of this interest

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34 Cf. the title of the dissertation by legal sociologist C.A. Groenendijk, *Bundeling van belangen bij de burgerlijke rechter* (1981) (Grouping of interests in civil litigation).

35 The Hoge Raad speaks fairly systematically about "associations"; in my view the same applies to foundations and to other legal persons. It merits attention that in this landmark case two out of the three legal persons were in fact not 'associations' but foundations.

36 Mancur Olsen, *The Logic of Collective Action* (1965).

in administrative proceedings. A remarkable link is thus made between civil law and administrative law.

- In assessing admissibility, what counts is not the usefulness of the grouping of interests for effective legal protection, but also the position that the legal persons in question possesses in administrative law. Now, the general law on environmental proceedings, and Art. 79 of the General Environmental Principles Act even states that

> "in respect of private law organisations, the interests for which they have been called into being shall be regarded as their interests."

But then, according to the Hoge Raad, they cannot be given a less favourable position in private law; they should therefore also have access to the judge in summary proceedings.

- Having regard to this status of Elckerlyc, "every man" in Dutch administrative environmental law, there is no need to postulate such additional demands as are mentioned in the literature, such as representativity, or actual activities, in order to be able to decide positively on admissibility. These points may perhaps play a role in other areas than environment protection.

I wish to make a couple of comments on this important judgment. There is a normative aspect concealed in the criterion of the **usefulness** of the grouping of interests. Collectivization must not only be technically possible but also acceptable from the viewpoint of the legal system, as the judge perceives it. Thus, the Hoge Raad had shortly before rejected the admissibility of the Foundation ZOROT (Zonder Recht Of Titel [without right or title]), which brought together the interests of a number of

squatters[37]. One of the interests pursued by this Foundation was guaranteeing the anonymity of those interested in the use of accommodation in the premises occupied by them, making the securing of clearance orders by owners and others considerably harder, particularly through the Hoge Raad's case law[38]. The disputes in the area of civil procedural law against (speculative) owners of immovable property and the squatters (or squatters' movement) have in part been settled by new legislation: the Act on Empty Premises, which now possesses a section, which will not come into force, on fair distribution of living accommodation in premises standing empty (for speculative reasons), and a section that has as a matter of fact come into force, making it easy to secure orders against anonymous defendants and defendants who have not appeared; this is a blatant distortion of the law of civil procedure and of the structure of the Act on Empty Premises, which I predicted in 1983[39]. **The interest of house owners lends itself to bringing together the interests of the other side**. Squatters are not permitted to come together as plaintiffs in a foundation, but they have by law to put up with being brought together as defendants, packed up and thrown out. If this is compared with the legally prescribed nature of the "association of flat owners" (Art. 876 of the Dutch Civil Code), it can be seen that technically there is nothing in the way of bringing together rights and interests in accommodation, but that in the case of the squatters ideological and political

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37 Hoge Raad, 5 October 1984, *Nederlandse Jurisprudentie* 1985, no. 445, note by W.L. Haardt.

38 See, e.g., Hoge Raad, 2 November 1979, *Nederlandse Jurisprudentie* 1980, p. 154; see also d'Oliveira, *loc. cit.* (note 4), pp. 173-174.

39 d'Oliveira, *op. cit.*, p. 176. On 1 January 1987 Art. 18 of the Act on Empty Premises on anonymous defendants was brought in.

objections are felt: plainly, there are interests felt not to **deserve** any grouping - however technically feasible.

A second observation is that the Reinwater Foundation, which along with three market-gardening legal persons (with market-gardeners organisations in the background) brought a civil action against the French potassium mines, would in all probability have been declared admissible ten years later. It was excluded from the proceedings for lack of a specific interest of its own, and the proceedings had to continue on behalf of the three market-gardeners. This classical method is of course still available today[40].

A third observation is that any representativity requirement for admissibility constitutes a dangerous threshold. In some countries this demand is translated into permits from the government: appointment by them as the spokesman for a collective interest. Where collective actions are often directed against the authorities, this sort of permission acts like a muzzle, tending to hold back control over actions by the authorities. From the viewpoint of procedural law too there is an objection, namely unwieldiness. How is the representativity of the Sittard section of the Dutch Society for the Protection of Animals to be assessed when it comes to securing a ban on folkloristic maltreatment of geese[41]? And to what extent can foundations be thought of in terms of representativity?

A further big problem arises when the representativity requirement is considered in its consequences for international proceedings regarding

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40 See Rechtbank Rotterdam, 8 January 1979, *Nederlandse Jurisprudentie* 1979, 113, note by J.C. Schultsz, *Ars Aequi* 1980, p. 788, note by d'Oliveira. For an English translation of this decision and comments, see: *Neth. Yearbook of International Law* 1980, pp. 326-333.

41 See Hoge Raad 2 January 1987, *Nederlandse Jurisprudentie* 1987, 458 with note by van der Grinten.

border crossing legal goods and interests. The Reinwater Foundation may be regarded as representative in the Netherlands (subsidized by central, regional and local authorities and accepted as an interlocutor by the Ministries and Ministers concerned), but is it also representative as regards the whole Rhine catchment area, even where action is taken in third countries? Does an international procedure have to be arrived at for recognition of representativity characteristics as determined by national judges or authorities[42]?

The link between standing *in civilibus* and art. 79 of the General Environmental Principles Act in the international context cannot but be weakened. When it comes to licensing procedures in other countries, the status of public interest groups is not derived from Dutch law, but from the foreign administrative law concerned.

In the meantime, the case law has come to follow the general principles of the Hoge Raad's ruling as regards environment protection. Other areas than the environment are also eligible for grouping of interests in civil proceedings, such as for instance the combatting of (race) discrimination.

In the *Sopar* case[43] the Middelburg President stated simply:

> "Reinwater cs can be admitted with their claims, as it is undisputed that their objectives as described in their bye-laws and their factual activities offer sufficient basis for their admission;"

It seems as if in the case law following the landmark *Nieuwe Meer* decision judges have become used to awarding standing to collective interest groups in environmental cases and do so without much ado; it must be noted, how-

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42 See below, par. 4.2.2.

43 See text with note 15 (3.1.2.b).

ever, that contrary to the Nieuwe Meer-ruling the Middelburg Court President seems to enquire into 'factual activities' of the organisations concerned. If the showing of these activities amounts to a condition to be fulfilled, the President is still less liberal than the Hoge Raad.

4.2. *Legislation in progress*

Although, or because, group defence of interests has acquired an increasingly firmer place in the case law and literature in the Netherlands, the legislator has also been concerned with the more general aspects. This has led - for the time being - to two different bills, one of which has since come into force: the Act on Equal Treatment of Men and Women[44].

Art. 20a[45] of this Act is the forerunner in a sub-area of the preliminary Draft of art. 3(11)8a of the new Dutch Civil Code, which covers a broader area. It is questionable whether incorporation into the Act of this power of action, with the outlines given, is quite so successful. Though developments that are just beginning are perhaps not entirely being stopped in their tracks, they are held back for the foreseeable future. The advantage of a statutory basis is purchased at the expense of the curtailment of existing possibilities as explored by the judiciary. This legislative activity has its influence also in other areas of group actions than that of sexual equality.

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44 Stbl. 1980, 86, as amended by Act of 27 April 1989, Stbl. 1989, 168.

45 Art. 20a: 1. Legal persons with full legal capacity that have the objective of promoting the interests of those who might appeal to the provisions of art. 1637 ij of the Civil Code and the provisions of this Act may in law demand that conduct in conflict with those provisions be declared unlawful, prohibited or made the object of an order to undo the consequences of the conduct.
2. (...).

4.2.1. The Preliminary Draft on Rights of Claim for Interest Organizations

In 1989, to implement a motion accepted by the Tweede Kamer (Lower House of Parliament) asking the Government to regulate the right of action by consumer organizations statutorily, a preliminary draft was published, which is now going the rounds of advice agencies and is also being commented on in the media.

It is no coincidence that this preliminary draft strongly resembles the provision just mentioned of the Equal Treatment Act:

> "A legal person with full legal capacity which in accordance with its statutes promotes interests of others can, should protection of these interests justify this, ask at law for conduct to be declared unlawful or for unlawful conduct to be prohibited."

This provision of the preliminary draft, which is ultimately to enter the New Civil Code as art. 3(11)(8a), goes further than the motion asked, so as to allow other than consumer organisations also to gain access to the judge in this way[46]. In other respects the formulation does not testify primarily to a need for bold advance beyond developments in the case law; on the contrary, the object is clearly to check these as quickly as possible and if possible push them back. This can be shown on the basis of a number of

46 On the preliminary draft see *inter alia* M.B.W. Biesheuvel et al., *Verdediging van collectieve belangen via de rechter* (1988), published on the occasion of the 50th anniversary of the Jonge Balie bij de Hoge Raad, discussed in *inter alia* D.W.J.M. Pessers, Behartiging van collectieve belangen, *Nederlands Juristenblad* 1988, pp. 605-607. See also: K. Rozemond, Het Voorontwerp Vorderingsrecht belangenorganisaties, *Rechtshulp* 1989, no. 4, pp. 8-19; D. van der Meijden and M. Robesin, *Nederlands Juristenblad* 1989, pp. 855-856, and Th. Drupsteen, *Milieu en Recht* 1989, p. 345; N. Frenk, Het Voorontwerp Vorderingsrecht belangenorganisaties nader geanalyseerd, R.M. Themis-8 (1989), p. 372-389, idem, Het vorderingsrecht voor belangenorganisaties, *Ts. voor consumentenrecht* 1990(3), pp. 203-217, idem, Kollektieve akties in Consumentenzaken, *Jaarboek consumentenrecht* 1990, pp. 321-327; W.C.L. van der Grinten, Vorderingsrecht belangenorganisaties; collectieve acties, *De Naamlooze Vennootschap* 1990, pp. 172-174; Frenk-Messer, Ongekende mogelijkheden voor milieuorganisaties!?, *Kwartaalbericht Nieuw BW* 1991, 1, pp. 14-17.

aspects in the provision.

In the first place, the provision is construed as an **exception** to a general principle, namely the maxim embodied in Art. 3(11)(8) of the New Civil Code that "without an adequate interest, no-one has a legal claim." This *'point d'intérêt point d'action'* principle, while a very old one, has not necessarily acquired a fixed meaning from its age: the 'interest requirement' is open to evolution from individual to (also) collective interest, from material and economic interest to ideal or moral interest, and even the concept of "economic" interest is open to new contents: thus, over recent decades the contrast between economy and ecology has fallen away, and ecological interest has become an element in the welfare economy, and has acquired constitutional status. In this way, the relationship between Arts. 3(11)(8) and 3(11)(8a) of the New Civil Code - construed as principle and exception - becomes highly problematical.

It is unclear in another respect too. As described above, the General Environmental Provisions Act (Art. 79) states that

> "... in respect of private law organisations, the interests for which they have been called into being shall be regarded as their interests."

These interests are thus these organisations' **own** interests, so that complaint and appeal are open in respect of them in procedures for granting permission. But Art. 3(11)(8a) of the New Civil Code construes the same interest as the interest of **others**[47]. Democratic participation in

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47 The draftsman of the provision takes the diametrically opposite position: according to his idea, the preliminary draft removes "the fiction of own interest" (cited by Pessers, *op. cit.*, p. 606). Ought fictions to be removed in the case of such legal persons as the co. ltd. or plc. too, then? Is it the interest of the legal person as such to engage in gainful activities in accordance with the articles of association? Or is it the management, the

administrative law seems in private law to be perceived as meddling. This cognitive dissonance is in conflict with the link that the Hoge Raad has made in the Nieuwe Meer ruling between administrative and civil law powers. If everybody's interests are at stake, why then are the interests of the organization whose aim it is to aggregate these interests not touched? Does a legal person not form part of 'everybody'?

One not very important, although characteristic, restriction is the demand that organisations must be a "legal person with full legal capacity".

The construction serves one further purpose: to push back general interest actions. Obviously, there is a smooth transition from actions on behalf of smaller or bigger groups to actions on behalf of the intangible general interest. Many actions on one's own behalf at the same time serve the community. But the tendency in the preliminary draft is clear: organisations ought better not to be directed at promoting general interests, for then they get in the way of the authorities (whether these do nothing or engage in wrongful activities). A step backward in the direction of the 19th century.

Furthermore, action may be taken only against "unlawful" conduct, which excludes, for instance, action in the sphere of law of contract. This is connected partly with the fact that Art. 6.5.2.A.6 of the New Dutch Civil Code provides regulations for action by interest organisations against provisions in general conditions that may be regarded as unreasonably burdensome[48]. In my view there is still a big gap to be closed between this

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shareholders who act through the legal person?

48 Cf. Rozemond, *loc. cit.*, p. 12 ff. See also the ruling by the Hague Tribunal, 15 February 1989, *Rechtshulp* 1989, no. 4, in which the Consumer Association was denied standing in a contractual matter, because this grouping of interests would encroach on the powers of the contracting parties concerned (millions of telephone subscribers), to decide themselves whether or not to bring proceedings. A paradoxical and very old-fashioned ruling!

limited right of claim in Art. 6.5.2.A.6 of the New Dutch Civil Code and the right of claim for interest organisations to be allowed by Art. 3(11)(8a) of the New Dutch Civil Code. Moreover, this restriction to the law of tort fails to recognize the development in legal theory which tends to link law of contract and law of tort closer together under the common denominator of law of obligations, in which misperformance too constitutes a tort. The clock is being turned back.

"If protection of these interests justifies this." This is a question of legal policy, the answer to which is clearly being left up to case law. As such, the formulation is nothing more than a bag of wind, signalling that the legislator too is powerless and can play little more than a ritual part.

A number of problems with working out group actions in practice, which could have been solved very well through legislation, have instead got bogged down, or rather, simply been denied.

One important problem is the significance that a legal ruling as to a claim by an interest organisation has for interested third parties: the extent of *res iudicata*. According to the preliminary draft an organisation, and this is again an important restriction, can only secure a declaratory that particular conduct is unlawful, or ask for a judicial injunction; the latter is important, since here the road to the judge in summary proceedings remains open. In summary proceedings a *penal sum* ("astreinte" or "dwangsom") can be imposed to back up the injunction; breaches make the penal sum claimable by and for the plaintiff. But the demand for compensation is excluded. Accordingly, the idea must be that the organisation that interests itself in the interests of third parties, "others", cannot suffer any damage of its own. But then it should be obvious that "others" should be able to benefit from the

judicial ruling on claims by an organisation even outside the interlocutory action. This is however not formally the case according to the preliminary draft. On the other hand, an organisation may well in fact suffer damage from the unlawful deed, namely in the form of costs incurred in preventing or combatting it. When, for instance in connection with an environmental disaster caused by unlawful deposits or emissions, an environment club incurs all sorts of extra costs to reduce the effect of the environmental disaster or exploit it in public opinion to prevent new catastrophes, these are extra expenditures of the club itself, which are therefore eligible for compensation insofar as they have been incurred within the context of its objectives.

The same applies to the cost of the litigation itself. In the Netherlands there are large numbers of organisations maintained in whole or in part by the authorities, on the idea or ideology that they can make an important contribution to participatory democracy or decision-making. Examples are the Landelijk Buro Racismebestrijding [National Office to Combat Racism] or the Reinwater Foundation. Such organisations regularly encounter the authorities, sometimes as discussion partners, sometimes as scapegoats, sometimes as providers of subsidies. If the authorities, then, believe that combatting abuses on the one hand, and the quality of public decision-making on the other, are served by maintaining independent organisations, then it is hard to see why these cannot either demand compensation or also be subsidized from general funds made available to those without adequate means seeking justice: legal aid[49].

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49 So-called State-financed legal aid. See my report on this (1983), loc. cit., p. 182 ff. In this respect it should be noted that the authorities, both local and central, have taken heart from the outcome of the litigation against the pollution from the French potassium mines, and are now extensively engaged in litigating against both national and foreign

The explanatory memorandum, referring to the fact that traditionally a judicial decision has effect only between the parties, rejects any effect for interested third parties. We already saw that this principle shows exceptions at various points, particularly as regards squatters to be evicted. Here too there is every reason, if only with a view to more effective protection of rights, to attribute more legal importance to a declaration of unlawfulness or a prohibition. The preliminary draft curtails the effect that actions by interest organisations have for third parties by on the one hand referring to a principle (*res iudicata*) which is already under pressure, and on the other limits the possibilities of action by referring to the procedural position of third parties, thereby managing to combine the worst of two worlds.

Van der Grinten has attacked the text of the preliminary draft because he considers it as an inadequate reaction upon unsavoury developments:

> "Promoting the general interest is the task of government, not of private organisations (...) I doubt to the extreme whether it is a felicitous development to grant organisations which assume the objective of promoting the general interest standing in civil courts. The organisation sets itself up in this way as would-be government (...). People who are injured *seriously* unlawfully in their rights and interests, have sufficiently passable legal ways to oppose injustice."

It may be clear from the foregoing that I do not share these individualistic and conservative points of view. Nevertheless, for opposite reasons, I share his conclusion: "A statutory regulation could be preferred above the present unwritten law because it could serve legal security. The present preliminary draft does not serve this purpose. (...) This is a matter that can be left to the

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polluters. The government here is clearly acting as a "free rider" on public interest litigation, started by a small foundation. It would seem perfectly logical, then, for the State to allow state-financed legal aid in this area, or to subsidize the bodies involved to enable them to pursue their aims in court.

legal development in the courts."

Until the present day the government has not seen fit to present a revised Bill on the basis of the comments received. For different reasons nearly the whole political spectrum has demonstrated grave doubts -- of course, for radically opposed reasons, and legal literature reflects these misgivings[50].

4.2.2. EEC

On 15 September 1989, the Commission of the EC launched a proposal for a **council directive on civil liability for damage caused by waste**[51].

This proposal is in various respects particularly interesting for the theme of group actions for collective interests. In the first place, environmental damage as such is taken into consideration. "Injury to the environment" is defined in art. 2(d) as: "a significant and persistent interference in the environment caused by a modification of the physical, chemical or biological conditions of water, soil and/or air insofar as these are not considered to be damaged within the meaning of sub-paragraph c), ii", i.e.,

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50 See, e.g., van Buuren-Betlem-Ijlstra, *Milieurecht in stelling* (1990) passim, esp. Braams-Grosheide-Messer, *Handhaving door algemente belangbehartigers via het milieu-aaansprakelijkheidsrecht*. The proposal of the authors to find inspiration in copyright law and more specifically the introduction of a private organisation endowed by statute with specific monopolistic powers, must be rejected. It is extremely doubtful that there exists such a thing as a "common interest" of environmental organisations which could be safeguarded by such a (federative) caretaker. Furthermore, it introduces compliance with a condition of representativity which in itself is very dangerous indeed in these (and other) fields. In the same vein Frenk-Messer, l.c. (note 46), p. 15, who take a less dim view of the possibilities of the proposed legislation.

51 Com (89)282 final-SYN.217. See on this proposed Directive C. de Villeneuve, La responsabilité civile pour les dommages causés par les déchets, in Ministero dell'Ambiente (ed.), *Atti*, 1° Forum internazionale "Valutazione del Danno ambientale", Assisi 30 Nov.-2 Dec. 1989, pp. 37-46, plus intervention d'Oliveira, ibidem, p. 44.

damage to property. Civil liability of the 'producer'[52] is engaged for this injury to the environment, as it is for damage to persons and property (art. 3). For the topic which is under discussion here art. 4(4) is of great importance. It states:

> "Where the law in Member States gives common-interest groups the right to bring an action as plaintiff, they may seek only the prohibition or cessation of the act giving rise to the injury to the environment. If, however, they have taken the measures provided for in paragraph 1(b), and (d), they may seek reimbursement of the expenditure resulting from such measures."

The explanatory memorandum (under 7) gives the following commentary to this provision:

> 7. Parties entitled to institute proceedings
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> In the first instance, the right to institute liability proceedings against the person causing the damage lies with the victim or his heirs.
> Concerning injuries to the environment, given the fact that those concern society, this right is given to the public authorities. This right may also be granted to special-interest groups or established, recognized associations whose corporate goal is to protect the environment or public health. For such groups, the Directive introduces a system that takes account of the law applicable in the Member States, some of which grant a direct right to proceed to such associations (Netherlands, Luxembourg) or, as in the case of France and Italy, permit them under certain conditions to institute civil proceedings joined to a criminal action or, finally, who remain virtually closed to such initiatives.
> The Directive is not designed to harmonize practices in this field. The Community has chosen an intermediate solution which consists in neither opposing current developments, nor precipitating potential developments. The same reasoning has been applied to the question of public bodies' right to sue.

Art. 4(4) is a failure in that it has not succeeded in unification or

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52 As defined in art. 2(a).

harmonization of rules concerning *locus standi* of public interest organisations. It refers to the law of the Member States as it stands or may develop, and does not exercise any direct pressure on those Member States which have not yet introduced possibilities for group actions in the area of environmental pollution. This same criticism has been raised by ECOSOC in its Opinion[53]. Nevertheless, one may expect that these countries, which have not yet introduced into their law *locus standi* for group action, are not at all immune against events occurring in their territory. By resorting to sophisticated forum shopping, action groups can confront those Member States with suits that are not allowed within their territory, and this may eventually weaken resistance against introducing locus standi for public interest groups. This is, for example, precisely what has been done in the *Sopar* case, given the fact that in Belgium these groups are considered not to have a personal and direct interest at stake[54].

As to the question who is entitled to take care of the environment, it is interesting to note, that public authorities and common-interest groups are juxtaposed in this text (art. 4(3 and 4)) which clearly shows the loss of monopoly of the government to serve the public interest as it thinks fit and that it now has to suffer possibly different views or other priorities, even against itself by aggregation of citizens.

Recently the European Parliament has voted amendments to the proposed

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53 Opinion Ecosoc (90/C 112/08) dd. 28.2.1990, OJ C112/23-25 dd. 7.5.1990, under 7.3. Cf. *Water Law*, July 1990, p. 33.

54 See, e.g., Bocken, De bevoegdheid van milieuverenigingen tot het instellen van burgerrechtelijke vorderingen tot sanktionering van de verstoringen van het leefmilieu, *TAR*, 5, 1973, pp. 235-243; Bocken-De Meulenaere, The Defense of Collective Interests in the Belgian Civil Procedure, *Belgian Reports for the IInd World Congress of Procedural Law*, Würzburg 1985, pp. 149-179.

directive[55]. A whole range of bold amendments have been forwarded, most of them improvements, and stepping forward where the Commission feared to tread.

The amendment for the text of art. 4(4) reads:

> "4. Common interest groups or associations, which have as their object the protection of nature and environment, shall have the right either to bring legal proceedings to seek any remedy under paragraph 1(b) or to join in legal proceedings that have already been brought. However, in order to avoid a proliferation of litigation, Member States may limit the number of such groups or associations by authorizing, at national, regional or municipal level, only certain groups or associations to exercise the right provided for under this paragraph."

This amendment is a considerable improvement as it grants a **community right of access** to the courts, both in internal and in international cases to common interest groups in the field. Although I am not satisfied that there is much necessity for streamlining this access to organisations recognized by national authorities, this would be in line with, e.g., French and Italian law and represents the present state of affairs in several countries. Another spectacular improvement is the lifting of the ban on certain remedies to be asked for by common interest groups. What the exact impact is of the right to join in legal proceedings remains to be seen; I would have thought that the general granting of standing would include the right to join pending proceedings and that, in the substance of the matter nothing will be changed by including joinder explicitly in the text of the directive. One may wonder which amendments will be integrated into the Commission's new

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55 EP Minutes of the proceedings of the sitting of 22 November 1990. Cf. Frenk-Messer, l.c. (note 46), p. 15-16.

proposal[56].

The Directive on civil liability for damage caused by waste is an emissary in the troubled land of civil liability for damage to the environment. In the aftermath of the Sandoz disaster, the Council asked the Commission in a resolution of 24 November 1986 to examine the problems posed by the damage to the environment and to review existing Community preventive and remedial measures. The Commission is still "preparing a communication to Council and Parliament which examines the problem related to the introduction of a system of civil liability for damage to the environment."[57] After five years the communication has not yet seen the light but the proposed directive might be seen as a reconnoitery manoeuvre.

4.2.3. Council of Europe

In the meantime the Council of Europe, already regularly active in the field of the environment, has drafted a more general **Draft Convention on Damage Resulting from Activities Dangerous to the Environment**[58]. Concerning *locus standi*, this interesting text contains in art. 20 a provision on action by organisations. It states

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56 See for the procedure art. 149 EC Treaty.

57 Explanatory Memorandum under (1) to the proposal for a Council Directive on civil liability for damage cause by waste. In its amendment the European Parliament introduced a new plea in the preliminary considerations: "Whereas there is still a vital need for a draft General Directive on civil liability for damage to the environment, due to the absence of centralized standards and the incomplete regulations in this field;"

58 Strasbourg, 23 January 1991, Dir/Jur (91)1. This draft has been prepared by the Committee of Experts on Compensation for damage caused to the environment and has been published to take account of any views expressed when preparing the final text, which then has to be examined by the CDCJ and finally submitted to the Committee of Ministers of the Council of Europe. See for a discussion of its provisions on jurisdiction above, par. 3.4.

Article 20 (Action by organisations)

1. Any association or foundation which according to its statutes takes care of the protection of the environment and which complies with any further conditions of national law of the State Party where the action is brought is entitled to bring an action in court or before a competent administrative authority
requesting

a. a prohibition of a dangerous activity which is unlawful and poses a grave threat of damage to the environment; or

b. an order to the operator to take measures to prevent an incident or damage; or

c. an order to the operator to reinstate or clean up the damaged environment.

2. National law may stipulate cases where the action is inadmissible.

3. Before deciding upon a request mentioned under paragraph 1 the court may, in view of the general interests involved, hear the competent public authorities with respect to the measures requested.

4. When the national law of a Contracting State referred to in paragraph 1 requires that the association or foundation has its registered seat or the effective centre of its activities in that State, such State may declare at the time of signature, ratification or accession that an association or foundation having its seat or centre of activities in another State Party and complying in that other State with the other conditions mentioned in paragraph 1 of this Article shall have the right to take action in accordance with paragraphs 1 and 2. The associations or foundations having their seat or centre of activities in a State Party which has made such declaration will have the same right in any other State which has made the same declaration.

The draft has tried to find a solution for the problem which the EC-directive in its original version left unresolved: recognition of *locus standi* of foreign legal persons in countries that require those bodies to have their seat there. The solution is very restrictive, in that it only envisages the situation that the

State where the action is brought allows in its municipal law for standing for organisations which are registered in that State or have there the effective centre of their activities. In that case such a state may declare itself prepared to grant standing to organisations having their seat or centre of activities in another State Party if this organisation is entitled in that State, according to art. 20 s. 1, to bring actions. Between States which have made this declaration standing of each other's environmental organisations shall be reciprocal. Thus, Greenpeace Belgium may be granted standing in the Netherlands where Greenpeace Belgium would have standing anyhow, only if the Netherlands make the declaration to this effect. The machinery looks somewhat heavy, and is indicative of the fundamental constitutional issues involved in granting standing to private bodies in areas which in 19th-century thinking are reserved for public authorities.

Another interesting feature is enshrined in art. 20(3), where "in view of the general interests involved" the competent public authorities may be heard by the court with respect to the measures which are requested. What if the competent public authorities are the "persons" who operate the dangerous activity? May the state be allowed to appear in two capacities: one as defendant and the other as *amicus curiae*?

5. The applicable law

In this report the present state of Dutch private international law concerning transfrontier environmental pollution can only briefly be summarized. We assume here, that it forms part of the private international law of tort, for which there does not exist any written conflict rule. Municipal Dutch p.i.l. in

this area develops on the basis of case law and legal literature, in open communication with trends in other countries[59].

Two characteristics are prominent in the development of international tort law, here as elsewhere: demecanization of the conflict rules involved, and favorization or protection of victims of pollution. The structure of Dutch conflict rules on environmental torts can be described as follows[60]:

5.1. a. First and foremost it is **party autonomy** which governs the indication of the applicable law. Parties may agree upon the application of a municipal system of law. Normally, this choice of law by the parties will take place after the event, i.e., after the occurrence or the start of activities which form the object of the suit[61]. In the *Reinwater* case which forms the clearest example of party choice of law being accepted by the Dutch courts, the Dutch plaintiffs had opted for application of Dutch law, and the French defendant had agreed with this choice in its pleadings before the Rotterdam District Court. In an interlocutory judgment[62], the court considered that the choice of law retroactively agreed upon by the parties for Dutch law could be accepted. The Hague Court of Appeal agreed, "as there are no objections"

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59 See recently, e.g., T. Ballarino, Questions de droit international privé et dommages catastrophiques, *Rec. des Cours* tome 220 (1990-I), pp. 293-387.

60 See generally Drion-de Boer, loose leaf Onrechtmatige daad (Torts) IIIc.

61 Cf. W. Snijders, Subsequent choice of law and compromissory Agreement (Vaststellingsovereenkomst), T.M.C. Asser Instituut (ed.), *Essays on international and comparative law in honour of Judge Erades* (1983), p. 134-142.

62 Distr. Court Rotterdam, 8 January 1979, NJ 1979, 113, *Ars Aequi* 1980, p. 788-794, note d'Oliveira.

(to be raised against it)[63]. Against this element of the judgment no cassation proceedings were instituted; the Hoge Raad in its summing up of the background of these proceedings only mentioned that Dutch law was applicable[64].

In this case Dutch law was both *lex fori* and *lex damni*. Parties may have the most diverse and exotic reasons to agree upon the application of a certain system of law. In the case at hand the French defendant accepted application of Dutch law, as it would gain a tier of jurisdiction by that choice: in cassation violation of foreign (e.g. French) law cannot be attacked (by anything else than complaints about lack of reasoning)[65].

5.2. b. In case parties do not make use of their autonomy, the judge falls back upon an objective connecting factor. According to a tradition which just goes back, in the Netherlands, to the second half of this century, the applicable law is found through the *lex loci delicti* rule[66], except if there is a closer connection with another country. Just as in the area of jurisdiction on the basis of the place of the harmful event the problem of Distanzdelikte -- so characteristic for transfrontier pollution cases -- has to be solved. It is not

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63 Court of Appeal the Hague, 10 September 1986. *Environmental Liability Law Review* 1981, 1, p. 15, note van der Meer, ibidem 1988, 2, pp. 33-43, note van Dunné.

64 Hoge Raad, 23 September 1988, NJ 1989, notes J.H. Nieuwenhuis and J.C. Schultsz, *Environmental Liability Law Review* 1989, pp. 12-30, note van Dunné.

65 Cf. d'Oliveira, *De antikiesregel* (diss., 1971), pp. 117-175; idem, Foreign law and legal cooperation, *Hague-Zagreb-Essays* 2 (1978), pp. 216-240.

66 See, e.g., Dubbink, *De onrechtmatige daad in het nederlandse internationale privaatrecht*, doct. thesis 1947; Th.M. de Boer, *Beyond lex loci delicti? Conflicts Methodology and Multistate Torts in American Case Law*, doct. thesis 1987, and the literature mentioned in Strikwerda, *Inleiding tot the nederlandse internationaal privaatrecht* (1990)^2, no. 178.

even always the case that the physical place of acting and the place of the damage do not coincide. The internationality of the case may also be constituted by the different identity in terms of nationality or domicile of the parties involved. One example is the Bhopal disaster in India, where the American subsidiary (Union Carbide) of an American corporation operated a chemical plant, which affected the neighbouring local population in such a devastating way[67]. Piercing the corporate veil may play a role here in identifying the place which can be deemed the place where the negligence was born.

If *locus actus* and *locus damni* are to be localized in different countries, then it is not clear beyond doubt what the situation according to Dutch p.i.l. is.

Some writers are of the opinion that in this situation it is for the judge to decide whether to apply the law of the place where the damaging activities are located, or the law of the place of the damage, presumably in view of choosing the most favourable law. Others, however, take the stand that in this case of plurality of places of the tort the switch has to be made towards the law of the place of the victim (plaintiff) -- which coincides in most cases with the *locus damni* -- with the proviso that defendant must have foreseen that the effects of his activities would make themselves felt there, and under the assumption that there is no law more closely connected[68].

Again there is the position (taken by the author) that it is not for the judge, but for the plaintiff-victim to determine the locus of the transboundary pollution and thus to indicate the applicable law[69]. What this boils down to

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67 See e.g., Zilioli, Il caso Bhopal, *Riv. giur. dell'ambiente* 1987, 2.

68 De Boer, Alternatieven voor de lex loci delicti, *Offerhauskring* 1982, Comp. van Rooij-Polak, *Private International Law* (1987), p. 138.

69 D'Oliveira, *La pollution du Rhin et le droit international privé* (1978), p. 81-127, idem,

is a unilateral choice of law by one of the parties, which seems justified by the guiding principle of protection of weaker parties and parties which serve weaker interests. At the same time this choice allows for optimalization of both preventive and compensatory measures. Developments in other countries lend support to this point of view.

In the *Benckiser* case[70] the Hoge Raad had occasion to explain itself on the applicable law as far as the alleged tort of Benckiser, the German firm, was concerned. The Dutch Supreme Court stated

> 4.7. (...) The complaint (...) that the Court of Appeal had to apply not Dutch but German law to the alleged tort must be rejected as well. The facts which the Court of Appeal took as the basis for its decision imply that Benckiser has acted unlawfully as accomplice to the torts of X (the director of Bos) and Bos Bouwstoffen, and that the activities of which Benckiser is accused, although taking place predominantly in Germany, have found their finality in the Netherlands in that the situation of which the termination is demanded in this case has been brought about here.
> Under these circumstances the Court of Appeal has rightly judged Benckiser's tortious behaviour according to Dutch law."

Here we have the case of three parties who were acting together, but in different countries and bringing about soil pollution in several places in the Netherlands. One of the defendants has even been condemned in a criminal trial for his part. It is not completely clear what the significance is of the

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Rijnvervuiling en internationaal privaatrecht, *Milieu en Recht* 1989, p. 146 ff.; idem, Le bassin du Rhin, sa pollution et le droit international privé, in *La réparation des dommages catastrophiques*. Les risques technologiques majeurs en droit international et en droit communautaire, Travaux des XIIIèmes Journées d'études juridiques Jean Dabin (1990), pp. 157-181 at p. 166 ff.

70 Hoge Raad, 14 April 1989, NJ 1990, 712, notes C.H.J. Brunner and J.C. Schultsz.

Hoge Raad's reasoning[71]. It has characteristics of what could be called **dependent localization** (accessoire aanknoping). The tort perpetrated by Benckiser is so intimately connected with the torts committed by the Dutch defendants that it is only fair (and expedient) to assess it according to the same law as is applied to the other defendants. As they acted in the Netherlands and the effect of their activities lay there, Dutch law applies to their illegal acts and this is decisive for the application of Dutch law also on Benckiser's role.

On the other hand the Hoge Raad talks the language of *locus damni*. Benckiser's activities have found their completion in the Netherlands, and redress is sought to change a factual situation in the Netherlands.

Puzzling is the fact that the Hoge Raad states that the Court of Appeal has **rightly** applied Dutch law. Under the assumption that the Court of Appeal could have chosen freely between *locus actus* and *locus damni* the apter phrase would have been: "the Court of Appeal could without violation of the law apply Dutch law under the circumstances mentioned". Unless one tries to read too much in this decision, and unless the Hoge Raad is choosing without much ado for the *locus damni* in transboundary cases (like the French Cour de Cassation), the tentative conclusion would be that this is a dependent localization case[72].

Whether this is the right perspective is another matter. Benckiser's activities

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71 Both the President in summary proceedings and the Court of Appeal seem to have applied the antikies-regel, emphasizing the fact that Benckiser's activities were illegal according to both Dutch and German law, or primarily according to Dutch law but at all events also according to German law.

72 See also the conclusions of Advocat-Général Asser who mentions these two options. In his note Schultsz reaches the conclusion that it is the participation in one set of facts which is decisive for the applicability of Dutch law.

have been decisive for what the Dutch defendants did: the German firm offered the opportunity, and wanted too badly to get rid of its poisonous waste, wherever, that it should be considered as the protagonist in the matter, who acted primarily in Germany. If there is dependent localization, then the other way round: the Dutch defendants could have been treated according to German law; unless one reaches the conclusion that Benckiser, under *locus damni* rule has to be judged according to Dutch law, and that this is decisive also for the Dutch defendants.

In the *Sopar* case the President clearly applied the Dutch municipal law of torts, without however explicitly stating as much. He concentrated on the acceptability of issuing the requested injunctions against a dimly discernible background of Dutch law of torts where, however, the silhouettes of Dutch and Belgian administrative law loomed as sketchy protagonists in the play. Parallelism between forum and ius, especially in the summary proceedings, may have driven the president to omitting a consideration on the applicable law, once he had established his jurisdiction.

5.3. c. The *lex loci delicti* as connecting principle retreats before **stronger indications** that another law is more adequate. It is difficult to speculate in which types of cases this loose device may clinch the applicable law. One could think of piercing-the-veil situations, as in the Bhopal case, where foreign parent companies are pulling the strings of sloppy daughter companies. We have seen that in *Benckiser* complicity in the evil doings of others may entail being judged according to the same law, if some other elements are present as well. Other forms of amalgamation are known in Dutch case law, where the tort is related to a pre-existing contractual

relationship[73]. In these cases sometimes the common nationality or domicile of the parties is taken to play a determining role. In this connection I would like to add that in the context of the EEC it is doubtful if it is at all allowed to use (common) nationality as a connecting factor. In view of the principle of non-discrimination within the ambit of the EC Treaty, laid down in art. 7 of the said Treaty, and under the assumption that most tort cases represent subject matter which is envisaged by the Treaty, nationality as connecting factor for the applicable law or as basis for remedial devices is suspect. Thus, art. 38 of the EGBGB after the recent codification of German private international law, which contains a provision protecting persons of German nationality, is contrary to this non-discrimination principle. Here the German public policy has to give precedence to the European public policy. In European law there is no place for *Inländerschutzklausel*[74].

6. Recognition and enforcement

More systematico a word or two on recognition and enforcement would be in place in this stage. As the author is somewhat pressed for time, he will not put in this word, and refer for this topic to the general textbooks and other earlier writings, primarily concerned with the EEX[75], and the Parallel

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73 See Strikwerda, l.c., nr. 182 for some examples. See also d'Oliveira, *Internationale Verkeersongelukken* (1965), p. 19, and Drion-de Boer, o.c., nr. 74 ff.

74 In the opposite sense: Rossbach, NJW 1988, p. 591.

75 Cf. Vlas in: van der Dungen, loose leaf commenting on the EEX ad Ch. III; Kropholler, *Europäisches Zivilprozessrecht* (1987)[2]; Gothot-Holleaux, *La Convention de Bruxelles du 27.9.1968* (1985); Verheul, *Rechtsmacht in het Nederlandse IPR*, deel 1, *Het EEG*

Convention of Lugano. In the area of recognition and enforcement concerning transboundary pollution, there is no Dutch case law that he is aware of; neither case law in other countries on the recognitions of Dutch court decisions.

7. Selected issues

In this last paragraph I would like to touch upon some problematic areas of transboundary pollution law and on some emerging elements of municipal law which are of special interest to this topic.

7.1. *Permits*

a. With the indication of the applicable law not all problems are solved. One issue merits special attention: the existence of permits for the activities which lead to the pollution of the environment and which may bring damage to property or other interests. The existence of a permit for these activities may influence the reaching of a conclusion about the legality of the polluting activities. In some countries a permit - within the conditions of which the polluting activities take place - make the actor immune for claims arising out of these activities, whereas in other countries there is no

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Bevoegdheids- en Executieverdrag (1982), deel 2 (1986), deel 3, *Erkenning en Tenuitvoerlegging van vreemde vonnissen* (1989), etc.; see also for questions of private environmental law especially the public policy exception of art. 27: d'Oliveira, *La pollution du Rhin et le d.i.p.* (1978), p. 116-117; Kohler, Zivilrechtliche Schadenersatz- und Unterlassungsklagen, gerichtliche Zuständigkeit und Verfahrensgrenze (Recht der Europäischen Gemeinschaften), in: Bothe-Prieure-Ress (eds), *Rechtsfragen grenzüberschreitender Umweltbelastungen* (1982), pp. 129-142; d'Oliveira, *Le bassin du Rhin, sa pollution et le d.i.p.* (l.c., note 69), p. 180; Betlem, *Grensoverschrijdend handhaven*, l.c. (note 15).

such effect. Permits, licences, authorizations and the like vary not only from country to country but within one country the same activity may be covered by different types of licences. Thus it becomes a common defence in international litigation that the polluting activities are covered by a licence granted in country A (the country where the activities take place), whereas the environmental tort is judged by a court in country B according to the municipal law of country B declared applicable by its conflict rules. Some questions that may be asked about this situation are the following. Must the significance which the permit has under the law of the issuing authority be transplanted into the applicable law of the tort? To give an example, will a French defendant who acted under a permit in which, according to French law, 'les droits des tiers sont réservés', profit from the fact that under the law applicable on the transboundary tort, say, German law, the comparable permit guarantees against law suits of third parties or not? Does it make a difference if the remedy sought is injunctive or pecuniary? Is it a relevant aspect that in the procedure leading to the issue of the authorization interests of the environment of other countries and their inhabitants have been put into the balance?

Solutions for these problems are still in a state of flux[76]. There are a few decisions which shed light on the matter under Dutch law, in the first place the Reinwater case. The Hoge Raad established that the Court of Appeal reached the conclusion, and this conclusion could not be attacked in cassation, as art. 99 of the Law of the Judiciary Organisation does not allow control of foreign law,

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76 See, e.g., d'Oliveira, De Rijnsanering in het slop, *Nederlands Juristenblad* 1980, pp. 85-93; Reports (Dutch) Association for Environmental Law 1989-3 (1990), p. 30, p. 43 et seq.; Hager, Zur Berücksichtigung öffentlich-rechtlicher Genehmigungen bei Streitigkeiten wegen Grenzüberschreitender Immissionen, *RabelsZ* 1989. pp. 293-319.

> "that the French licence to discharge to which the MDPA conformed also in respect of its conditions has not the objective to balance the relevant interests in such a way as to immunize the holder of the licence against liability in tort. This conclusion is manifestly based on the construction of the permit and the reservation therein contained concerning the rights of third parties, especially the users of the water who experience damage by the chloride discharges, such against the background of nature and objectives of the French legislation concerned;"[77]

Implicit in this rejection of the complaint is, that the licence involved is accepted into the Dutch applicable law with its status under French law. (As a matter of fact both systems of law allow law suits in tort notwithstanding the existence of a licence in situations in which it is not alleged that the defendant violated the conditions of the permit.) French administrative law, then, is combined with Dutch civil law.

In the *Sopar case*, the President approached the matter in a slightly different way. He seemed to be prepared to take into account statutory norms of both Belgium and the Netherlands, and enquired into conditions in permits concerning discharges of PACs in both countries. He stated:

> "It does not appear that in Belgium and/or the Netherlands observance is required of an enterprise as Sopar's by the authorities of a strict norm of 0,1 microgram/liter. In the establishing of an objective standard to be observed by Sopar, there is no better orientation than the norm contained in the discharge permit which allows her to discharge up to 30 micrograms/liter of waste water. This only more so because it does not appear that this standard deviates unfavourably from standards imposed in the Netherlands and/or Belgium on comparable enterprises."

But with this statement the case was not yet finished. Although it was not

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77 Cf. the note by J.C. Schultsz in NJ 1989, 743 sub 3.

disputed that Sopar stayed within the conditions of the permits, this left the question open if third parties could nevertheless demand compliance with stricter norms. It is here that the president's reasoning becomes extremely interesting, as he makes a distinction between the position of third parties generally and third parties which act for the common or general interest:

> "4.6. May private parties, as Reinwater c.s., demand from Sopar that it comply with a stricter norm than that which is (usually) required by the public authorities? I think it as weighty for the answer to this question that Reinwater c.s. are not to be considered as exclusively entitled to the interests for which they seek protection through this law suit. The (environment of the) canal Ghent-Terneuzen and/or the Westerscheldt does not belong to her in this sense. Although this does not need to lead to non-admissability of her claims, as said above, this position does play a role in defining the extent and nature of the care due to her, of the standard which may be applied.
> The question of the lawfulness of a harmful act towards a person who has an exclusive entitlement to a property which is damaged thereby is not completely answered by referring to the compliance with a standard of public law; there is only room for applying stricter standards on behalf of those entitled parties, whose interest is not or hardly different from the general interest, under extraordinary circumstances.
> In this case Reinwater cs stand up only for the interests as just indicated, whereas the existence of special circumstances - such as, e.g., that the public law standard is not any longer acceptable according to the general view of society - has not been made sufficiently clear."

Follows the rejection of the claim. The referral to a change in what society thinks of the existing norms and standards is intriguing as it does not indicate, in this international case, which society the president has in mind. Dutch, Belgian or both? EC level? The judge comes near to applying a kind of non-choice rule, or a double-barrelled rule concerning the standards contained in permits: that they have to comply both with statutory norms in the country of origin of the activity, and with those in the country where the

activities take effect.

b. This brings me to another issue concerning permits. Under international law it is allowed for states and international organisations to bind activities elsewhere to municipal rules if these activities have a certain impact there or show a certain connection with the country or organisation involved. Extraterritorial legislation in the area of competition law is a common and accepted phenomenon; the same goes for taxation, criminal law and many other branches of law. Seen from the stand-point of public international law there is nothing strange about a situation in which one and the same activity is (potentially) regulated by norms of two separate systems of law, e.g., by requiring permits from both countries. Whether this is in fact the case depends on the interpretation of the legislations involved. In my opinion the Dutch law concerning the pollution of surface waters (Wet Verontreiniging Oppervlaktewateren) allows for requiring enterprises based in other countries to ask for a Dutch licence, whenever they directly or indirectly discharge polluting substances into Dutch surface waters. If this is the case, then, as in the Reinwater-MDPA case and in the Sopar case, foreign enterprises without such licences are already infringing Dutch law as they are discharging upon Dutch surface waters without Dutch permits. This is a controversial issue. Some authors do not agree at all[78].

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78 See J.H. Jans, *Europees Milieurecht in Nederland* (1991), p. 222/223: "Extraterritorial application of environmental legislation becomes only problematic when this violates the rights of persons derived from the legal system of those other sovereign states. For example, when foreign discharging bodies, in the case of transboundary effects in the Netherlands, would be considered to be obliged to have a licence according to Dutch law as well. (...) Such measures will only take shape on the basis of international conventions." For me, it is just the other way around. In the example the Netherlands are entitled, under public international law, to require a Dutch authorization from foreign-based enterprises if their activities affect Dutch territory. Although the requirement of double - or even manifold - licences is aesthetically repulsive, it is still

7.2. *Municipal and substantive law*

As we have seen, the European Commission is preparing a communication concerning the problems related to the introduction of a system of civil liability for damage to the environment. The harmonization of the civil liability systems in the Member States of the EC would presumably be based on a legal transformation of the economic polluter pays principle. Presumably some type of strict liability would be introduced, as in the draft Directive on civil liability for damage caused by waste. But there are other elements which are important for collective action for diffuse interests as well.

I mention two questions:

a. The need for **information**. In order to successfully engage in activities leading to litigation for the protection of the environment, it is vital to collect information concerning the polluter and his legal position as concerns permits etc. In many countries third parties have no part to play in the administrative proceedings leading to the issue of a permit, and in others permits are kept secret as sensitive materials or trade secrets. The Strasbourg draft Convention on Damage Resulting from Activities dangerous to the Environment, drawing on earlier conventions and resolutions, contains a chapter on access to information: both held by public authorities and by operators as define in the Convention (arts. 14-18).

Confining myself to the information held by operators, the provisions seem to take with the one hand what they give with the other. The person suffering damage may request a court to order an operator to provide him

allowed. To streamline this *bellum omnium contra omnes* one needs international conventions in which states etc. agree upon common standards. Cf. the many Conventions for the avoidance of double taxation. See the literature referred to in note 76.

with specific information, insofar as this is necessary to establish a claim under the Convention, such as the kind and concentration of the dangerous substances employed or released, etc. (art. 18(1)). Presumably information about the permit should be asked from the public authorities involved under art. 15. It is very unfortunate, however, that there is an extensive list of exceptions to the obligations to furnish information[79], so that it may be feared that plaintiffs will stay empty-handed and will have to grope in the dark concerning the extent of the polluting activities of the operator. Nevertheless, the convention gives an opening - be it a slight one - in this important area.

b. **Remedies**. There has been a clear tendency not to allow public interest organisations to claim the same remedies as injured private parties. In the Dutch preliminary draft on Rights of Claim for public interest organisations[80] does only allow for injunctions but not for recovery of any damages.

The proposed Directive is a little bit more liberal. It states (art. 4 (4 and 5)), that common interest groups

> "may seek only the prohibition or cessation of the act giving rise to the injury to the environment. If, however, they have taken the measures provided for in par. 1 (b) and (d) they may seek reimbursement of the expenditure resulting for such measures."

The measures referred to are those 'to prevent the damage or injury to the

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79 I read art. 18(5) as referring to paragraph 2 (not 3) of art. 15, which applies mutatis mutandis to access to information held by operators.

80 See under 4.2. (p. 31 ff).

environment' (par. 4(b)) and 'measures taken for the restoration of the environment to its state immediately prior to the occurrence of injury to the environment', and expenditure incurred in connection with these measures (art. 4(d)).

It will depend on the interpretation of these provisions to which extent group action may succeed in claiming damages. Is a publicity campaign urging an enterprise or a group of enterprises to reduce discharges to be considered as expenditure for the restoration of the environment etc.? And research that will be used as a basis for such a campaign to rouse public opinion[81]? As we have seen, the amendments by the European Parliament gives common interest groups much more opportunities in claiming remedies. It seems to me that this is an important contribution to a development in which the perspective on activities endangering or harming the environment will show a strong human rights component, with the implication that litigation to safeguard the environment may be seen as human rights litigation with structured *actiones populares*.

In a very recent case the district court of Rotterdam, 15 March 1991[82] took a bold step forward.

Thousands of sea-birds were covered with oil in the wake of an accident with a Rumanian bulk carrier, the Borcea, off the Dutch coast. One of the oldest Dutch bird protection associations took charge of a saving operation together with other environmental organizations: clearing off the birds,

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81 See the discussion about this topic in Ministero dell'Ambiente, *Atti*, 1° Forum nazionale (footnote 47), pp. 44-46. See about the preliminary draft M. Killerby, ibidem, pp. 33-36.

82 Unpublished, rolno. 7473/89 (Nederlandse Vereniging tot Bescherming van Vogels/Intreprindera de Exploatara a Floti Maritime Navrom). See Baauw-Frenk, Nieuwe Perspectieven voor milieuorganisaties, *Nederlands Juristenblad* 1991, p. (forthcoming).

housing in asylums for a while and repopulation of the area. The organizations involved now bring a suit before the Rotterdam tribunal to recover their costs from the Rumanian owner of the ship.

The Court explains its decision to award these damages as follows:

> "In view of the purpose and activities which plaintiff has developed to realize its aims already for a period of 40 years -- this is uncontested -- this general interest (conservation and protection of sea-birds, d'O) must also be seen as an interest of plaintiff; she can in a case of violation of her own interests be admitted in a request for putting an end to this violation, but also in a claim to compensation of the damage she suffered in trying to limit the effects of this violation.
> It is not clear why she should be entitled to prevent or put an end to a violation of her interest but not be entitled to claim the damage she has suffered as a consequence of this violation, or to claim from the author of this violation the expenses she has had to lay out for restriction or prevention of the consequences of this violation."

Again we observe that the general interest involved is considered to be at the same time the interest of plaintiff, a public interest organization. The Rotterdam District Court is in line with the above-mentioned Nieuwe Meer arrest[83] in this respect. But it goes a necessary but bold step further in accepting that the author of the tort acts also tortiously as regards the public interest organization, with the implication of a duty to pay damages and costs, if this organization is acting with discretion within the limits of its self-chosen purpose. With this good news I end this report.

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83 See above, par. 4.1.

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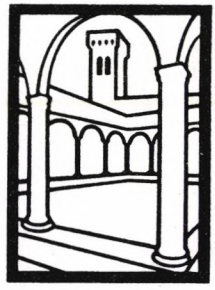

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